

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling)	
That USA Datanet Corp. is Liable)	
For Originating Access Charges)	WC Docket No. 05-276
When it Uses Feature Group A)	
Dialing to Originate Long Distance)	
Calls)	

BELLSOUTH COMMENTS

BellSouth Corporation (“BellSouth”), on behalf of its affiliated companies, submits these comments in response to the *Public Notice* issued in this docket.¹ As BellSouth explains in greater detail below, the Commission’s *AT&T Declaratory Ruling*² is not limited to telecommunications services that use “one plus” (1+) or Feature Group D (“FGD”) dialing. While the *AT&T Declaratory Ruling* was confined to a specific service presented in the AT&T petition, the Commission’s analysis is equally applicable to other telecommunications services. Accordingly, the Commission should grant the declaratory ruling requested by Frontier Communications (“Frontier”).

¹ *Pleading Cycle Established for Frontier’s Petition for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, WC Docket No. 05-276, *Public Notice*, DA 05-3165 (rel. Dec. 9, 2005).

² *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) (“*AT&T Order*” or “*AT&T Declaratory Ruling*”).

**THE ANALYSIS CONTAINED IN THE AT&T DECLARATORY
RULING IS NOT LIMITED TO A SPECIFIC DIALING ARRANGEMENT**

Frontier states in its petition that, in the context of oral argument over a Motion to Dismiss filed in federal court by interexchange carrier USA Datanet Corp (“Datanet”) in an action filed by Frontier to recover unpaid access charges, “Datanet’s attorneys argued that footnote 58 of the AT&T Order limits the reach of that Order to services that use 1+ or Feature Group D dialing.”³ Neither footnote 58 nor any other provision of the *AT&T Declaratory Ruling* limits the reach of the Commission’s analysis contained in that order.⁴

Footnote 58 of the *AT&T Declaratory Ruling* is comprised of two sentences:

The ISP/VoIP Coalition asks the Commission to rule that, even if some forms of VoIP are found to be telecommunications services, services that do not use 1+ dialing are information/enhanced services. ISP/VoIP Coalition Reply at 4-5. Because AT&T’s specific service does utilize 1+ dialing, other VoIP services that do not are beyond the scope of this proceeding.⁵

The first sentence of footnote 58 notes that certain commenters sought a broad ruling that *all* services that do not use 1+ dialing are information services and thus enhanced services. In the second sentence, the Commission declines to make this broader declaration, limiting its specific ruling to the service offered by AT&T. However, the Commission did not limit its analysis in the *AT&T Declaratory Ruling* to 1+ dialing or FGD access arrangements, as the text and context of the *AT&T Declaratory Ruling* plainly demonstrate.

³ Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling, WC Docket No. 05-276, at 5 (filed Nov. 22, 2005) (“Frontier Petition”). Datanet does not challenge Frontier’s characterization of this argument in its subsequent responsive pleading. USA Datanet Corp. Opposition and Motion to Dismiss, WC Docket No. 05-276 (filed Dec. 6, 2005) *passim*.

⁴ Frontier refers to the *AT&T Declaratory Ruling*, *supra* note 2, as the “AT&T Order.” Frontier Petition at 4.

⁵ *AT&T Declaratory Ruling*, 19 FCC Rcd at 7466, n.58.

The Commission's legal and regulatory analysis in the *AT&T Declaratory Ruling*, which it undertook to determine the regulatory status of a specific service under existing law, is akin to a "holding," the legal principle to be drawn from the opinion or decision of a court.⁶ Because a holding involves a determination of a matter of law that is pivotal to a judicial decision, if a statement is not a statement of law, it cannot be a holding.⁷ The Commission's various statements regarding the specific dialing patterns associated with the service at issue in the *AT&T Declaratory Ruling* are, in context, statements of fact to which the Commission then applied its regulatory analysis under existing law, and cannot properly be characterized as a limiting part of the holding of that decision.⁸

Thus, in the *AT&T Declaratory Ruling*, the Commission refers to the dialing patterns associated with the long distance service at issue based on the statements contained in AT&T's original petition in order to establish the predicate for the Commission's subsequent legal and regulatory analysis.⁹ In this context, the Commission described the dialing arrangement commonly associated with the specific long distance service presented by AT&T:

Feature Group D trunks allow end users to use 1+ dialing for long-distance calls, with the call being handled by the caller's preselected interexchange carrier. Without use of Feature Group D, the user must first dial a 7- or 10- digit number, a calling card number and PIN number, and then the desired telephone number. Harry Newton, *Newton's Telecom Dictionary* 318 (19th ed. 2003).¹⁰

⁶ *Black's Law Dictionary* 658 (5th ed. 1979) (holding is "opposite of dictum").

⁷ Bryan A. Garner, *A Dictionary of Modern Legal Usage* 405 (2d ed. 1995).

⁸ As the Commission specifically notes, the *AT&T Declaratory Ruling* represents the Commission's analysis of one specific type of service under existing law based on the record compiled in that specific proceeding. *AT&T Declaratory Ruling*, 19 FCC Rcd at 7464, ¶ 10.

⁹ *Id.* at 7464, ¶ 11.

¹⁰ *Id.* at n.46.

Indeed, this description of possible dialing arrangements simply demonstrates that 1+ dialing is an alternative, substitute or replacement for 7- or 10- digit dialing, followed by a longer sequence of dialed digits associated with a calling card number, a PIN number, and ultimately, the desired telephone number – similar to the dialing arrangement associated with Feature Group A (“FGA”) service as described in the Frontier Petition.¹¹ FGA is a switched access service just as FGD. Thus, both dialing arrangements can be used to make a call that requires originating and terminating access, as can other access dialing arrangements, such as “0+”, “0-”, and “8XX”, and the legal analysis that the Commission subsequently undertook in the *AT&T Declaratory Ruling* applies to the service at issue regardless of dialing arrangement.¹²

Each time the Commission mentions 1+ dialing in the context of its ensuing analysis, it does so to emphasize that the use of 1+ dialing in association with AT&T’s specific service is no different than that use of 1+ dialing in connection with traditional, circuit switched telecommunications services to which access charges are applicable under existing law. Thus, the Commission observed that with respect to AT&T’s specific service, “[e]nd users place calls using the same method, 1+ dialing, that they use for calls on AT&T’s circuit-switched long-distance network.”¹³ The end users using these arrangements, the Commission found, do not pay

¹¹ Frontier Petition at 1-2.

¹² Of course, because AT&T’s specific service used 1+ dialing, the Commission was not presented with the opportunity to address the applicability of its analysis to another company’s specific service that may not require 1+ dialing. *AT&T Declaratory Ruling*, 19 FCC Rcd at 7466, n.58. The Commission is now presented with that opportunity, *Public Notice* at 2, and should grant the declaratory ruling requested by Frontier.

¹³ *AT&T Declaratory Ruling*, 19 FCC Rcd at 7566-67, ¶ 15 (finding that AT&T’s specific service provided no enhanced functionality, but rather the same type of interexchange access as obtained by other carriers, and that the service imposes the same burdens on LECs as do circuit switched calls).

rates different from AT&T's circuit switched services.¹⁴ When the Commission applied its analysis to these specific facts, it concluded the specific service was a telecommunications service.¹⁵ It emphatically did not rule (and expressly declined to rule) that all non-1+ dialing arrangements constitute enhanced or information services.¹⁶

The *AT&T Declaratory Ruling*'s analysis established three criteria that may be used to determine whether a particular service is a "telecommunications service" or an "information service" under existing law, and none of these three criteria is whether the service at issue uses 1+ dialing or FGD trunks. Although the Commission based its analysis on AT&T's specific service that in fact involved 1+ dialing, 1+ dialing is not one of the decisional criteria established by the Order. As the Commission explained, AT&T's 1+ dialing-based service is a telecommunications service because it is:

an interexchange service that (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology. Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.¹⁷

¹⁴ *Id.* at 7469, ¶ 18.

¹⁵ *Id.* at 7472, ¶ 24.

¹⁶ *Id.* at 7466, n.58.

¹⁷ *Id.* at 7457-58, ¶ 1.

This language plainly shows that the Commission’s analysis is not limited to 1+ dialing arrangements and is to be applied to additional “services that meet these three criteria regardless” of the number of interexchange carriers involved.

Indeed, the essential holding of the *AT&T Declaratory Ruling* appears in paragraph 12 of the Order, which makes no mention of 1+ dialing or FGD access. Here, the Commission applies existing statutory definitions established by Congress in the Telecommunications Act of 1996, decisional precedent of the Commission established in the *Non-Accounting Safeguards Order*, and certain tentative conclusions reached in an earlier report to Congress.¹⁸ What was critical for the Commission was not that 1+ dialing arrangements were used in connection with the service, but rather that the specific service was not an “information service” based on the foregoing authority.

The Commission returns to its core holding in the context of its subsequent analysis of the applicability of access charges to AT&T’s specific service: “when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges.”¹⁹ Thus, the Commission looked at AT&T’s service in order to determine whether it was enhanced or not, the Commission determined the service was not enhanced, and the Commission further determined that access charges applied.

The Commission can and should analyze the Frontier petition in light of the core holding and its essential rules. FGA is a switched access service just as FGD. While the switched access

¹⁸ *Id.* at 7465, ¶ 12.

¹⁹ *Id.* at 7470, ¶ 19.

arrangements have different dialing patterns, the dialing patterns do not change the nature of the service provided by the underlying carrier, nor do they affect the fact that both arrangements are access services. Because both originating and terminating access charges apply under existing rules to interexchange services, without regard to the dialing arrangements used in these services, it is appropriate for the Commission to apply its analysis announced in the *AT&T Declaratory Ruling* to the facts presented by Frontier and find that the services described in Frontier's Petition are telecommunications services for which access charges are due.

CONCLUSION

Consistent with the *AT&T Declaratory Ruling*, the Commission should grant the declaratory ruling requested by Frontier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 9th day of January 2006 served the following with a copy of the foregoing **BELLSOUTH COMMENTS** via electronic filing and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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